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No. (1)

In The

Supreme Court of the United States

ADRIANA MERCEDES BENAVIDES RIVERA,
ANDRES MAURICIO MEJIA VELA,
AGENCY CASE NOS. A 97-199-661, 97-199-662,

Petitioners,

vs.

ALBERTO GONZALES, ATTORNEY GENERAL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Introductory statement:

The issue is really whether the ninety (90) days to timely file a Motion to Reopen to the Board of Immigration Appeals from the date of the final order is mandatory and jurisdictional foreclosing any and all equitable tolling, even if for good cause. The Board of Immigration Appeals, (hereinafter BIA) interprets and applies *Abdi v. U.S. Attorney General*, 430 F.3d 1148, 1149-50 (11th Cir. 2005) contrary to its plain meaning and contrary to law, making conclusory statements unsupported by the record, case law precedent, statute or the regulations at 8 C.F.R. Section 1003.2(c)(2), and abusing discretion. The U.S. Court of Appeals for the Eleventh Circuit then affirmed the misguided faulty analysis of the *Abdi* Decision by the BIA, abusing its discretion, that extended without legal justification the ruling in *Anin v. Reno*, 188 F.3d 1273, 1278 (11th Cir. 1999) in an In Absentia removal order context. The *Abdi* Decision itself never reached Motions to Reopen in the Ineffective Assistance of Counsel context, and the *Abdi* Court as well as the BIA state in *Abdi* that they do not reach the Ineffective Assistance of Counsel issue. Yet the *Abdi* Court affirms the BIA Decision to deny Petitioner's Motion to Reopen by extending *Abdi* to Motions to Reopen based on Ineffective Assistance of Counsel.

1. Whether the BIA AND U.S. Court of Appeals Decisions affirming that *Abdi v. U.S. Attorney General*, 430 F.3d 1148, 1149-50 (11th Cir. 2005) is a correct and proper application of the law, specifically in finding that the ninety (90) day time period to file a Motion To Reopen is mandatory and jurisdictional, foreclosing any and all equitable tolling regardless of good cause shown, is contrary to law, the plain meaning of the case, case law

QUESTIONS PRESENTED – Continued

precedent in the other ten (10) U.S. Circuit Courts of Appeal, statutes and regulations, and an abuse of discretion.

2. Whether or not the interpretation and application of the *Abdi* Decision of the BIA upheld by the U.S. Court of Appeals for the Eleventh Circuit is contrary to law, and an abuse of discretion, in that it wrongfully extends the *Anin v. Reno*, 188 F.3d 1273, 1278 (11th Cir. 1999) analysis in the In Absentia Removal Order/Motion to Reopen context to a Decision based on Ineffective Assistance of Counsel context, contrary to *all* previous legal precedent of the other U.S. Circuit Courts of Appeal, the plain meaning of the *Abdi* Division itself and U.S. Supreme Court ruling in *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 96; 111 S. Ct. 453, 457-58, 112 L. Ed. 2d 435 (1990) relied upon by the *Abdi* Court.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit appears at Appendix A to the petition and is unpublished.

STATEMENT OF JURISDICTION

This Court's jurisdiction is conferred by INA Section 242, 8 U.S.C. Section 1252 and jurisdiction below at the BIA was conferred by 8 C.F.R. Section 3.1(b) re the Appeal from the Decision of the Immigration Judge Denying Appellant's application for Relief from Removal/ Deportation pursuant to INA Section 208(a) and INA Section 241(a)(1)(B). Petitioner filed for Asylum under INA Section 208(a), Withholding of Removal pursuant to INA Section 241(b)(3), 8 U.S.C. Sections 1158 and 1251(b)(3), and for relief pursuant to the Convention Against Torture under 8 C.F.R. Sections 208.16 to .18 and 1208.16 to .18. Venue is proper in this Court because the Proceedings before the Immigration Judge were completed in Miami, Florida which is within this circuit. See INA Section 242(b)(2), (b)(9), 8 U.S.C. Section 1252(b)(2), (b)(9). See *Lopez-Ruiz v. Ashcroft*, 298 F.3d 886 (9th Cir. 2002).

JURISDICTION

A timely petition for rehearing was denied by the United States Court of Appeals on 05/22/2007, and a copy of the order denying rehearing appears at Appendix E.

This Court's jurisdiction is conferred by 28 U.S.C. Section 1254(1), 28 U.S.C. Section 2350 and INA Section 242, 8 U.S.C. Section 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

See attachment to Table of Cited Authorities (above).

CONSTITUTIONAL ISSUES

1. Fifth Amendment to the U.S. Constitution, Due Process Clause.

2. Fourteenth Amendment to the U.S. Constitution, Due Process and Equal Protection Clauses.

3. Sixth Amendment to the U.S. Constitution, Right to Counsel.

(see attached sheets)

STATEMENT OF THE CASE

Petitioners, Adriana Mercedes Benavides Rivera and her husband, Andres Mauricio Mejia Vela, are both citizens of Colombia who were served with a Notice to Appear (hereinafter NTA) on 12/19/2003 and then filed an Application for Asylum, Withholding of Removal and relief under the Convention Against Torture on Form I-589 on or about 05/05/2003 with the U.S. Citizenship and Immigration Service, and the Miami, Florida Immigration Judge on 06/28/2004, issued an Oral Decision that Denied their claims for relief, following a Notice of Intent to Deny being issued by the C.I.S. on 09/03/2003. On

07/28/2004, Petitioner's previous counsel, Nicolas A. Olano, filed an EOIR-26 Notice of Appeal from a Decision of the Immigration Judge.

On 05/10/2005 the BIA sent a Notice of Briefing Schedule to the parties with Petitioner's Brief being due on 05/31/2005. On 08/12/2005, the BIA issued a Summary Dismissal of Petitioner's case because the record indicated that the appellant did not file such brief or statement, or reasonably explain the failure to do so, within the time set for filing, and dismissed the case accordingly.

On 08/24/2005 Petitioner's former counsel filed a Motion To Reconsider with the BIA, which was Denied by the BIA Order dated 12/06/2005. Petitioners consulted with Mr. Olano in mid-December, 2005. On 01/01/2006, Petitioners consulted with this attorney and retained this attorney to represent them, to file a Motion To Reopen their case pursuant to their Sixth Amendment Right to Counsel and consistent with *Matter of Lozada*, 19 I. & N. Dec. 637 (BIA), *affd*, 857 F.2d 10 (1st Cir. 1988) re an Ineffective Assistance of Counsel Claim, as well as researching other possible remedies.

On 05/12/2006 this attorney filed the Motion To Reopen with the BIA. On 08/03/2006 the BIA issued the Decision Appealed from, Denying Petitioner's Motion To Reopen because the ninety (90) day time period was held to be "mandatory and jurisdictional" which foreclosed equitable tolling. The Eleventh Circuit Court of Appeals issued its Decision per the Entry of Judgment dated 02/28/2007, in effect adopting the BIA interpretation and application of *Abdi*, supra, and denying all requested relief by Petitioner, affirming that the BIA interpretation of *Abdi v. U.S. Atty. Gen.*, 430 F.3d 1148 (11th Cir. 2005) that

the ninety (90) day time period to file a Motion To Reopen was "mandatory and jurisdictional" which foreclosed equitable tolling. Petitioner then filed a Petition For Rehearing En Banc Of The Decision of The U.S. Court of Appeals for the Eleventh Circuit on 04/14/2007 that was Denied on 05/22/2007 by Order of the U.S. Court of Appeals for the Eleventh Circuit.

STATEMENT OF THE FACTS

The Decision of the BIA on 08/03/2006, Denied Petitioners Motion to Reopen as untimely because it was filed more than ninety (90) days after Petitioner's learned of the prejudice to their interests by their former counsel, consulted with present counsel on 01/01/2006 and had their claim discussed and analyzed. The BIA wrongly interpreted and applied *Abdi v. U.S. Atty. Gen.*, 430 F.3d 1148, 1149-50 (11th Cir. 2005), holding that the ninety (90) day time period to file a Motion To Reopen is mandatory and jurisdictional pursuant to the *Abdi* ruling, foreclosing all equitable tolling regardless of good cause, a ruling contrary to every other U.S. Circuit Court of Appeal that has addressed the issue. The Motion to Reopen at issue of Petitioners was filed only 132 days after the Petitioners first discovered or became aware of the prejudice they suffered from the conduct of their prior counsel, Mr. Olano, and were advised as to the legal remedies available to them on 01/01/2006; and only 157 days after the BIA Order of 12/06/2005. A Bar Complaint had to be prepared and filed with the Florida Bar as well as requesting a copy of the Petitioner's file from previous counsel which did not arrive at this attorneys office until the end of January, 2006. All of this happened in Hollywood, Florida, about six

(6) miles south of Ft. Lauderdale, Florida, in the aftermath of the direct hit of the eye of Hurricane Wilma through the middle of Broward County, Florida, where Hollywood and Ft. Lauderdale are located. Hurricane Wilma was the worst Hurricane to hit South Florida in Broward County in over 50 years. (Hurricane Andrew struck Miami-Dade County in 1992). We ask the Court to take Judicial Notice of Hurricane Wilma. The BIA wrongly and inappropriately interpreted and applied the ruling by the U.S. Court of Appeals for the Eleventh Circuit in *Abdi v. U.S. Atty. Gen.*, 430 F.3d 1148, 1149-50 (11th Cir. 2005). The Petition for Review was then filed with this Court to review whether the ruling in *Abdi*, supra, is applicable and whether it can withstand judicial scrutiny as good law. The U.S. Court of Appeals for the Eleventh Circuit upheld the BIA interpretation and application of *Abdi*, supra, to the present case pursuant to their Denial Decision of 02/28/2007. Petitioners timely filed a Petition for Review En Banc on 04/14/2007, the Court dismissing same on 05/22/2007.

PROCEEDINGS BELOW

Petitioners were served with a Notice to Appear in Miami Immigration Court on 12/19/2003, filing an I-589, Application for Asylum Withholding of Removal and Relief under the Convention Against Torture on or about 05/05/2003 with the U.S. Citizenship and Immigration Service and, on 06/28/2004, a Denial Decision was issued by the Miami Immigration Judge. On 07/28/2004 a timely Notice of Appeal of the Order of the Miami Immigration Judge was filed with the Board of Immigration Appeals. On 08/12/2005 a Final Order was issued by the Board of Immigration Appeals (hereinafter

BIA), the Decision by the BIA Summarily Dismissing Petitioners' Appeal pursuant to 8 C.F.R. Section 1003.1(d)(2)(i)(E) re Appellant's Appeal Brief being filed untimely. On 08/24/2005, Petitioners' former counsel filed a Motion To Reconsider with the BIA that was Rejected by the BIA on 08/29/2005 because the required filing fee was not submitted. Following submission of an executed and signed Appeal Fee Waiver Request by the lead Petitioner the BIA issued a Filing Receipt For Motion To Reopen or Motion To Reconsider on 09/12/2005. On 12/06/2005 the BIA issued a Decision dismissing prior counsel's Motion To Reconsider the Denial Decision by the BIA dated 08/12/2005. On 05/12/2006 Petitioners' filed a Motion To Reopen with the BIA based on Ineffective Assistance of Counsel and relying on Equitable Tolling due to the impact of Hurricane Wilma on South Florida on 10/24/2005, prior counsels previous conduct, and Petitioners not receiving actual notice of their problem until 01/01/2006 when they consulted with their second counsel.

On 08/03/2006 the BIA issued a Decision dismissing Petitioners' Motion to Reopen as untimely interpreting *Abdi v. U.S. Atty. Gen.*, 430 F.3d 1148, 1149-50 (11th Cir. 2005) as requiring *all* Motions to Reopen be filed within ninety (90) days because the ninety (90) day time period is "mandatory and jurisdictional." After a timely Petition for Review of the Decision of the BIA was filed with the U.S. Court of Appeals for the Eleventh Circuit (hereinafater "Eleventh Circuit") the Eleventh Circuit issued its Decision dismissing Petition for Review of a Final Order of the BIA dismissing Petitioners' Motion to Reopen as untimely as the ninety (90) day time period was held to be "mandatory and jurisdictional," pursuant to *Abdi v. U.S. Atty. Gen.*, 430 F.3d 1148, 1149-50 (11th

Cir. 2005), on 02/28/2007. On 04/14/2007 Petitioners timely filed a Petition for Rehearing En Banc of the Decision of the U.S. Court Of Appeals for the Eleventh Circuit that was Denied 05/22/2007.

REASONS FOR GRANTING THE PETITION

The U.S. Court of Appeals for the Eleventh Circuit's prior Decision, entered on 02/28/2007, had addressed the Issue of whether or not the Motion to Reopen filed with the Board of Immigration Appeals on 05/12/2006 was untimely pursuant to the ninety (90) day rule which was held to be mandatory and jurisdictional barring equitable tolling, upholding the BIA Decision wrongly interpreting and applying the U.S. Circuit Court of Appeals for the Eleventh Circuit ruling in *Abdi v. U.S. Atty. Gen.*, 430 F.3d 1148, 1149-50 (11th Cir. 2005). See also *Anin v. Reno*, 188 F.3d 1273, 1278 (11th Cir. 1999).

That the Denial of Petitioners Motion to Reopen by the BIA is contrary to law, and an abuse of discretion, in that the Eleventh Circuit Court of Appeals precedent case relied upon by the BIA, *Abdi v. U.S. Atty. Gen*, 430 F.3d 1148, 1149-50 (11th Cir. 2005), and its companion, *Anin v. Reno*, 188 F.3d 1273, 1278 (11th Cir. 1999), are not applicable to the instant case because this case was timely filed by the historical standards of prior and Eleventh Circuit law, within 180 days, actually 132 days after Petitioner's first consultation with this attorney on 01/01/2006 and a total of 157 days after the BIA Order of 12/06/2005 that this Motion To Reopen at issue was filed in response to.

Further, the *Abdi* Decision is dicta insofar as it applies to this case or cases like it because the holding in the case is that the BIA did not arbitrarily or capriciously exercise their discretion in denying the Motion To Reopen in that prior proceeding which was filed well over one year after the Court Order therein.

The Eleventh Circuit ***misinterprets*** the law by trying to apply an analysis from the context of an In Absentia Final Order pursuant to the *Anin* case where Respondent there waited almost two (2) years to file the Motion To Reopen; whereas the present case is in the context of an Ineffective Assistance of Counsel claim that underlies the present Motion To Reopen. The Petitioners have acted diligently, especially in light of Hurricane Wilma and the added procedures imposed by *Matter of Lozada*, 19 I. & N. Dec. 637 (BIA), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

The Eleventh Circuit Court analyses in *Abdi* is ***internally inconsistent***, an overreaching of the holding of the case with the Court straining to reach for new law not available based on the facts of the case, the precedent relied upon or the past and present legal precedent that contradicts it, despite the Court wishing it were otherwise.

Petitioner believes that the present Decision dated 02/28/2007 by the Panel of BIRCH, DUBINA and BARKETT, Circuit Judges, is an incorrect interpretation and application of the *Abdi* Decision, See *Abdi v. U.S. Atty. Gen.*, 430 F.3d 1148, 1148-50 (11th Cir. 2005). Contrary to the interpretation and application of *Abdi* in the Decision in *Rivera* on 02/28/2007 the Court in *Abdi* simply affirmed that the BIA did not arbitrarily and capriciously Deny the Respondents Motion To Reopen filed almost two (2) years after the disputed Final Order. See page 1149 in

Abdi, supra. The Holding in the *Abdi* case, see Headnote one (1) was the Court Reviewing the Board's Order for abuse of discretion. In Headnote (3) at page 1148 of *Abdi*, supra, it *states*: *"Ninety-day time limit on motions to reopen immigration proceedings may be subject to the doctrine of equitable tolling. 8 C.F.R. Section 1003.2(c)(2)."* And Headnote Four (4) states, or restates the Holding, noting: "Board of Immigration Appeals (BIA's) refusal to reopen appeal from immigration judges removal order, which had been dismissed for alien's failure to file an appellate brief, was not abuse of discretion, despite alien's claim of ineffective counsel, where ninety (90) day time limit for filing motion to reopen *had long since run*. (emphasis added).

The Court first cites a supposed reliance on the U.S. Supreme Court case of *Irwin v. Dept. of Veteran's Affairs*, 498 U.S. 89, 111 S.Ct. 453, 457-58, 112 L. Ed. 2d 435 (1990), noting how the *Irwin* Court allowed for equitable tolling but only where the claimant exercised due diligence. *Irwin*, far from supporting the supposed holding in *Abdi* as applied by the BIA, contradicts it.

The Court next turns to the 180-day time limitation for motions to reopen filed pursuant to former INA Section 242B(c)(3)(A), 8 U.S.C. Section 1252b(c)(3)(A) (repealed 1996), for In Absentia deportation orders which could *NOT* be equitably tolled on account of ineffective assistance of counsel. The Court cites *Anin v. Reno*, 188 F.3d 1273, 1278 (11th Cir. 1999). This is a false analogy to true ineffective assistance of counsel claims by INNOCENT PETITIONERS who HAVE EXERCISED DUE DILIGENCE under the circumstances. It is a heartless, evil and draconian exercise in the arbitrary exercise of judicial

power totally divorced from the humanitarian and remedial purposes of equitable tolling in cases that merit such.

By Judicial Feat the *Abdi* Court would throw all Motions To Reopen into the Wolf Pit, regardless of whether or not the Petitioners were victims or wrongdoers! This cannot stand! The *Abdi* Court then falsely relies on two (2) points in an attempt to justify this horrible mutation of *Abdi*:

> a) At page 1150 the Court states that it relies on Supreme Court guidance, but does not cite what case because it certainly could not be *Irwin*, stating:
>
> " . . . We stated that pursuant to "the statute's plain language . . . general principles of statutory construction, "and Supreme Court guidance, there were no exceptions to the filing period for motions to reopen. *Id.* at 1279 . . . "
>
> b) Further citing *Anin*, the Court states:
>
> " . . . In reaching our holding in *Anin*, we stated, "***No exceptions have been carved into the . . . filing deadline by federal courts.*** More generally, *no exception to an INA deadline has been found even where an alien acts blamelessly. "Id.* at 1278."

First, the analysis from *Anin* is not appropriate because the statute there deals with In Absentia Orders and the applicants have already failed to appear in court and have a totally different burden of proof because they were given warnings or service of the NTA in most cases.

The Court in *Abdi* would extend the above In Absentia principle to an entirely different kind of applicant – an applicant who is relying in Good Faith on the effective

assistance of his licensed and degreed counsel, who is also an officer of the Court. The Court would have us believe that *NO EXCEPTIONS* have been carved into the filing deadline by the federal courts! In the latter case of innocent victims of Ineffective Assistance of Counsel nothing could be further from the truth. Please reference the case cites set forth below from the following U.S. Circuit Courts of Appeal for the 1st, 2nd, 3rd, 7th, 8th, 9th and 10th Circuits that all recognize the Doctrine of Equitable Tolling in the appropriate cases: (see Petitioner's Opening Brief, pages 10-12 for case summaries). See also *Osei v. INS*, 305 F.3d 1205 (10th Cir. 2002).

Equitable Tolling for Ineffective Assistance or Fraud.

1) *Ray V. Gonzales*, 439 F.3d 582, 588-92 (9th Cir. 2006)

2) *Pervaiz v. Gonzales*, 405 F.3d 488, 490 (7th Cir. 2005)

3) *Borges v. Gonzales*, 402 F.3d 398 (3d Cir. 2005)

4) *Riley v. INS*, 310 F.3d 1253, 1257-58 (10th Cir. 2002)

5) *Galvez Pineala v. Gonzales*, 427 F.3d 833, 838-39 (10th Cir. 2005)

6) *Mahmood v. Gonzales*, 427 F.3d 248 (3d Cir. 2005)

7) *Chen v. Gonzales* 415 F.3d 151, 153-54 (1st Cir. 2005)

8) *Hernandez-Moran v. Gonzales*, 408 F.3d 496 (8th Cir. 2005)

9) *Scorteanu v. INS*, 339 F.3d 407, 412-14 (6th Cir. 2003)

10) *Iavorski v. INS*, 232 F.3d 124 (2d Cir. 2000)

Far from making an all encompassing holding about Motions to Reopen in a case involving review of the BIA's discretion, the Eleventh Circuit QUALIFIES it holding not once, *but twice,* in Footnotes No. 1 and No. 2, noting that the BIA had already determined that the *doctrine of*

equitable tolling did not apply to facts of the case and, secondly, in Footnote No. 2 that the *Court specifically refused to address the issue of ineffective assistance of counsel raised* by Petitioner. See *Abdi v. U.S. Atty. Gen.*, 430 F.3d 1148, 1150 at Footnote No. 1 and No. 2 (11th Cir. 2005). (emphasis added).

The Eleventh Circuit in *Abdi* noted above that the FACTS distinguished *Abdi* from an equitable tolling case by stating that Petitioner filed it *long after* the 90 – day deadline." (emphasis added). *Id.*

Since the BIA in their Decision of August 3, 2006 applied *Abdi* incorrectly in light of the above analysis of the Eleventh Circuit holding in *Abdi*, the BIA must be reversed by this Court. The BIA has simply overextended and misapplied the limited ruling in *Abdi*, stating in their Decision:

"The respondents claim that prior counsel was incompetent, because prior counsel failed to file a timely brief with this Board, which caused us to summarily dismiss their appeal. However, the Eleventh Circuit Court of Appeals has stated that the motion to reopen period is "mandatory and jurisdictional," and not subject to equitable tolling. *Abdi v. U.S. Atty. Gen.*, 430 F.3d 1273, 1278 (11th Cir. 2005); see also *Anin v. Reno*, 188 F.3d 1273, 1278 (11th Cir. 1999) (concerning motion to reopen "in absentia" order)." See *Pervaiz v. Gonzales*, 405 F.3d 488 (7th Cir. 2005).

The BIA even notes how the facts in *Anin* are concerned with an "in absentia order." The Respondents claim Petitioner's are asking this Court to "ignore its own precedent" and that Petitioner's are requesting that the *Abdi* holding be Reversed (. . . only an en banc court can reverse a prior panel decision). This is clearly not the case

as the above makes clear. Petitioner is seeking only to have this Court find that the BIA and U.S. Eleventh Circuit Court of Appeals Decision upholding the BIA interpretation and application of *Abdi* is not correct – that *Abdi* must be limited to the facts and issues the Eleventh Circuit cited in Footnotes No. 1 and No. 2 as well as by citing the *Anin* case – a case involving a different statute and an In Absentia Order the petitioner there sought to reopen.

This is exactly what Petitioner herein seeks – that *Abdi* does *not* apply to a case of ineffective assistance of counsel, especially a meritorious case such as Petitioner's where counsel and Petitioner's were victims of Hurricane Wilma, the worst Hurricane to hit South Florida in 50 years on 10/24/2005.

Consequently, given the limitations by the Eleventh Circuit as noted above in their Decision in *Abdi*, as well as the In Absentia facts in *Anin* versus the Ineffective Assistance of Counsel facts herein, plus the compelling case holdings by most of the other U.S. Circuit Courts of Appeal, this Court is compelled to reverse the Decision of the U.S. Court of Appeals for the Eleventh Circuit issued on 02/28/2007 upholding the Decision of the Board of Immigration Appeals on 08/03/2006, the holding of the Eleventh Circuit Court being as an *incorrect interpretation and application of the law, as well as an abuse of discretion*. See *Wong Wing Hang v. INS*, 360 F.2d 715, 718-719 (2d Cir. 1966), and *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

CONCLUSION

Based upon the foregoing the Petitioner Adriana Mercedes Benavides Rivera, et al., respectfully requests that this Court Grant Petitioner's Petition for a Writ of Certiorari for the compelling precedent setting reasons set forth above to correct an incorrect interpretation and application of the law and to prevent irreparable harm to countless innocent victims of ineffective assistance of counsel and other circumstances deserving of equitable remedies like every other Circuit Court of Appeals to address this issue in the United States has done, and, Reverse the Decision of the Eleventh Circuit Panel in *Rivera*, entered in the above styled matter and Grant Relief to Petitioners not inconsistent with this Court's Order, including the proper interpretation and application of *Abdi v. U.S. Atty. Gen.*, 430 F.3d 1148 (11th Cir. 2005) and any and all other relief the Court deems proper.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-14749
Non-Argument Calendar

Agency Nos. A97-199-661
A97-199-662

Adriana Mercedes Benavides River,
Andres Mauricio Mejia Vela,

Petitioners,

versus

U.S. ATTORNEY GENERAL,

Respondents

Petition for Review of a Decision of the
Board of Immigration Appeals

(Filed Feb. 28, 2007)

Before: BIRCH, DUBINA and BARKETT, Circuit Judges.

PER CURIAM:

Petitioners Adrianna Mercedes Benavides Rivera and Andres Mauricio Mejia-Vela, through counsel, petition this court for review of the BIA's final order denying the reopening of an appeal of the IJ's denial of their claims for

asylum, withholding of removal, and CAT relief.[1] The BIA denied the motion to reopen as untimely.

On appeal, Rivera, while acknowledging that the motion to reopen was not filed within ninety days of the BIA's denial of her motion for reconsideration, nevertheless argues that equitable tolling principles should be applied because her counsel was ineffective. Specifically, Rivera argues that her previous counsel failed to file proper and timely motions, and he "misled" her until she later confronted him.

We review the BIA's denial of a motion to reopen for an abuse of discretion. *Gbaya v. U.S. Att'y Gen.*, 342 F.3d 1219, 1220 (11th Cir. 2003). "Our review is limited to determining whether there has been an exercise of administrative discretion and whether the matter of exercise has been arbitrary or capricious." *Abdi v. U.S. Att'y Gen.*, 430 F.3d 1148, 1149 (11th Cir. 2005) (citation and internal quotation marks omitted). One way to show an abuse of discretion is to highlight the application of an incorrect or improper legal standard. *See In re Ford Motor Co.*, 471 F.3d 1233, 1250 (11th Cir. 2006).

"Motions to reopen are disfavored, especially in a removal proceeding, where, as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." *Abdi*, 430 F.3d at 1149 (citation and internal quotation marks omitted). An alien may file one motion to reopen, and that motion "'shall state the new facts that will be proven at a

[1] We refer to the petitioners as "Rivera," because she is the lead petitioner in this case, and Mejia-Vela was only included in the original asylum proceeding as a derivative applicant.

hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material.'" *Id.* (quoting INA § 240(c)(7)(A), (B), 8 U.S.C. § 1229a(c)(7)(A), (B)). "A motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing." 8 C.F.R. § 1003.2(c)(1) (quoted in *Abdi,* 430 F.3d at 1149).

"A motion to reopen immigration proceedings 'must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened.'" *Abdi,* 430 F.3d at 1149 (quoting 8 C.F.R. § 1003.2(c)(2)). "[T]he statutory 90-day period for filing a notice of appeal is mandatory and jurisdictional, and, therefore, it is not subject to equitable tolling." *Id.* at 1150. This is true, even though counsel's deficient performance may have caused the appeal to be untimely filed. *Id.* at 1148-50.

In *Abdi,* an attorney appealed the BIA's order denying a petitioner's claims for relief, but failed to file a timely supporting brief, and so the BIA dismissed the appeal. *Id.* at 1149. Over one year later, the petitioner, represented by different counsel, filed a motion to reopen on the ground that the first attorney was ineffective for failing to file the required supporting brief. *Id.* The BIA denied the motion to reopen, and we affirmed on appeal because the motion was not timely filed. *Id.* at 1149-50.

"Under the well-established prior panel precedent rule of this Circuit, the holding of the first panel to address an issue is the law of this Circuit, thereby binding all subsequent panels unless and until the first panel's holding is overruled by the Court sitting en banc or by the Supreme

Court." *Smith v. GTE Corp.*, 236 F.3d 1292, 1300 n.8 (11th Cir. 2001).

Given our controlling precedent in *Abdi*, we conclude that the BIA here did not abuse its discretion in denying the motion to reopen as untimely. Rivera did not file her motion to reopen until May 12, 2006, indisputably more than ninety days after the BIA denied her motion for reconsideration on December 6, 2005.

PETITION DENIED

Judd Barton James
Hollywood Immigration Clinic, Inc.
4437 Hollywood Blvd. – Suite C
Hollywood FL 33021

February 28, 2007

RE: 06-14749-II Adriana Mercedes Benavides Rivera v. U.S. Atty. Gen.
AGCY NO.: A97-199-661
CC: Judd Barton James
CC: Regina Byrd
CC: Russell J.E. Verby
CC: David V. Bernal
CC: Administrative File

United States Court of Appeals
for the Eleventh Circuit

No. 06-14749

Agency Nos.
A97-199-661
A97-199-662

ADRIANA MERCEDES BENAVIDES RIVERA,
ANDRES MAURICIO MEJIA VELA,

Petitioners,

versus

U.S. ATTORNEY GENERAL,

Respondent.

- - - - - - - - - - - - - - - - - - -

Petition for Review of a Decision of the
Board of Immigration Appeals

- - - - - - - - - - - - - - - - - - -

JUDGMENT

(Filed Feb. 28, 2007)

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as judgment of this Court.

Entered: February 28, 2007
For the Court: Thomas K. Kahn, Clerk
By: Gilman, Nancy

Stamp: ISSUED AS MANDATE
MAY 30 2007
U.S. COURT OF APPEALS
ATLANTA, GA.

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041
Decision of the Board of Immigration Appeals

Files: A97 199 661 – Miami
A97 199 662

Date: AUG 03 2006

In re: ADRIANA MERCEDES BENAVIDES-RIVERA
ANDRES MAURICIO MEJIA-VELA

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENTS: Judd James, Esquire

ORDER:

PER CURIAM. We denied the respondents' appeal on August 12, 2005, and denied a motion to reconsider on December 6, 2005. The respondents filed an untimely motion to reopen on May 12, 2006. *See* 8 C.F.R. & 1003.2(c)(2) (motion to reopen must be filed within 90 days of final Board decision). The Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service) has not responded to the pending motion, which will be denied.

The respondents claim that prior counsel was incompetent, because prior counsel failed to file a timely brief with this Board, which caused us to summarily dismiss their appeal. However, the Eleventh circuit Court of Appeals has stated that the motion to reopen period is "mandatory and jurisdictional", and not subject to

equitable tolling. *Abdi v. U.S. Atty. Gen.*, 430 F. 3d 1148, 1149-50 (11th Cir. 2005); *see also Anin v. Reno*, 188 F. 3d 1273, 1278 (11th Cir. 1999) (concerning motion to reopen *in absentia* order). In any event, the respondents consulted new counsel on January 1, 2006, where their claim was discussed and analyzed, Respondents' Mot. at ¶ 12, well more than 90 days before the pending motion was filed. The motion to reopen is, therefore, denied.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
MIAMI, FL

A 97-199-661 May 18, 2006

BENAVIDES RIVERA, ADRIANA MERCEDES

TO: Board of Immigration Appeals
Office of the Clerk
P.O. Box 8530
Falls Church, VA 22041

This Record of Proceedings (ROP) is forwarded to the Board of Immigration Appeals for Consideration of the following:

[ ] Appeal of the Immigration Judge decision.

[ ] Appeal of Immigration Judge decision on a motion to reopen.

Please note:

[ ] The respondent/applicant is DETAINED

[ ] Other _____
_____

[ ] This ROP is for an appeal on a decision entered prior to July 1, 1996.

This ROP is being submitted to APU at the following state:

[ ] Notice of Appeal filed. Tapes need to be transcribed.

[ ] IJ has signed decision. Briefing schedule needs to be set.

[ ] Motion for Extension of Time to Extend Briefing Schedule has been submitted

[ ] Briefing Schedule is complete/expired.

APPENDIX C

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

A97 199 661 – Miami
A97 199 662

Date: DEC 06 2005

In re: ADRIANA MERCEDES BENAVIDES RIVERA
ANDRES MAURICIO MEJIA VELA

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENTS: Nicholas A. Olano, Esquire

APPLICATION: Reconsideration

The case was last before the Board on August 12, 2005, when we summarily dismissed the respondents' appeal for failure to submit an appeal brief pursuant to 8 C.F.R. § 1003.1(d)(2)(i)(E). The respondents have now filed a motion to reconsider our prior decision. The motion to reconsider will be denied.

A motion to reconsider requests that the original decision be reexamined in light of additional legal arguments, a change of law, or an argument or aspect of the case that was overlooked. *Matter of Cerna*, 20 I&N Dec. 399 (BIA 1991); *see also* 8 C.F.R. § 1003.2(b) (2005). In this case, the respondents assert that they filed a timely appeal brief and, thus, the Board erroneously concluded that the respondents failed to file an appeal brief. In support of their assertion that they did file a brief, the respondents submitted a letter from Philip Senkus of Apollo Express Courier and a copy of an appeal brief

allegedly sent to the Department of Homeland Security (DHS) regarding the respondents' claim for asylum.

A review of the documents reflects that the respondents have failed to establish that the Board's prior decision warrants reconsideration. The letter from Philip Senkus indicates that Apollo Express Courier delivered a brief to the Board of Immigration Appeals on May 31, 2005. However, the letter is particularly vague. It does not indicate the exact date that the respondents' attorney's office, located in Miami, Florida, to the courier service, which located at 8260 Greensboro Drive, Suite 240, McLean, Virginia 22102. More importantly, the letter does not indicate that the brief that was delivered relates to the respondents.

The respondents also submitted a photocopy of their brief that was allegedly filed with the DHS. However, the photocopy does not reflect a date stamp from DHS reflecting the date of receipt of the brief by DHS. At the same time, the Board's records do not reflect that an appeal brief relating to the respondents was filed at the Board before, on, or after May 31, 2005. Moreover, noticeably absent from the evidence submitted in support of the motion to reconsider, is an affidavit from either the respondents' attorney or a staff member attesting to the timely filing of the appeal brief. Therefore, to new legal argument, error or fact, or particular aspect of the case which was overlooked ground upon which to reconsider our previous decision. Accordingly, the respondents' motion to reconsider will be denied.[1]

---

[1] It should also be noted that the respondents initially failed to submit the required fee of $110.00 or the Fee Waiver Request Form

(Continued on following page)

ORDER: The respondents' motion to reconsider is denied.

FOR THE BOARD

(Form EOIR-26A). Pursuant to notification by the Office of the Clerk that the motion was defective, the respondents submitted a Form EOIR-26A. While the alleged declaration contained in the Form EOIR-26A is by Adriana M. Benavides, it is not signed by the declarant. Rather, the Form EOIR-26A is signed by the respondents' counsel. Thus, the fee waiver is not in compliance with 8 C.F.R. § 1003.24(d).

APPENDIX D

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041
Decision of the Board of Immigration Appeals

File: A97-199-661 – Miami Date:AUG 12 2005

In re: MEJIA-VELA, ANDRES MAURICIO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: Olano, Nicholas A., Esquire

ORDER:

PER CURIAM. The appeal is summarily dismissed under the provisions of 8 C.F.R. § 1003.1(d)(2)(i)(E). The appellant checked the block on the Notice of Appeal (Form EOIR-26) indicating that a separate written brief or statement would be filed in support of the appeal. This block is immediately followed by a clear warning that the appeal may be subject to summary dismissal if the appellant indicated that such a brief or statement will be filed and, within the time set for filing, fails to file the brief or statement. The appellant was granted the opportunity to submit a brief or statement in support of the appeal. However, the record indicates that the appellant did not file such a brief or statement, or reasonably explain the failure to do so, within the time set for filing. Accordingly,

the appeal is summarily dismissed under the provisions of 8 C.F.R. § 1003.1(d)(2)(i)(E).

FOR THE BOARD

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-14749-II

ADRIANA MERCEDES BENAVIDES RIVERA,
ANDRES MAURICIO MEJIA VELA,

Petitioners,

Versus

U.S. ATTORNEY GENERAL,

Respondent.

- - - - - - - - - - - - - - - - - - -

On Appeal from the United States District Court
for the Southern District of Florida

- - - - - - - - - - - - - - - - - - -

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

(Filed May 22, 2007)

Before: BIRCH, DUBINA and BARKETT, Circuit Judges.

PER CURIAM:

The petition(s) for Rehearing are DENIED and no Judge in regular active service on the court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE

ORD-42
(2/05)

No. 07-243

In the Supreme Court of the United States

ADRIANA MERCEDES BENAVIDES RIVERA, ET AL.,
PETITIONERS

v.

PETER D. KEISLER, ACTING ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
DONALD E. KEENER
ALISON R. DRUCKER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
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QUESTION PRESENTED

Whether the court of appeals correctly held that the Board of Immigration Appeals did not abuse its discretion in denying petitioners' untimely motion to reopen their removal proceedings based on allegations of ineffective assistance of counsel.

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In the Supreme Court of the United States

No. 07-243

ADRIANA MERCEDES BENAVIDES RIVERA, ET AL.,
PETITIONERS

v.

PETER D. KEISLER, ACTING ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-4) is not published in the *Federal Reporter* but is reprinted in 219 Fed. Appx. 869. The orders of the Board of Immigration Appeals (Pet. App. 7-10, 11-13, 14-15) and the oral decision of the immigration judge (App., *infra*, 1a-9a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 5-6) was entered on February 28, 2007. A petition for rehearing was denied on May 22, 2007 (Pet. App. 16-17). The petition for a writ of certiorari was filed on August 20, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, establishes the procedures by which an alien may move to reopen proceedings after the Board of Immigration Appeals (BIA) has issued a final order of removal. In general, the INA allows an alien to file only one such motion and specifies that "the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal." 8 U.S.C. 1229a(c)(7)(A) and (C)(i) (Supp. V 2005). The statute specifically excepts two kinds of cases from the 90-day deadline: in a case involving asylum or withholding of removal, there is "no time limit" for a motion to reopen involving a claim of "changed country conditions," 8 U.S.C. 1229a(c)(7)(C)(ii) (Supp. V 2005); and there is a 180-day time limit for a motion to reopen a proceeding in which a removal or deportation order was entered *in absentia*. 8 U.S.C. 1229a(b)(5)(C); 8 U.S.C. 1229a(c)(7)(C)(iii) (Supp. V 2005). The statutory time limits are mirrored in the regulations governing the reopening of proceedings before the BIA. 8 C.F.R. 1003.2(c)(2)-(3).

2. Petitioners are natives and citizens of Colombia. Petitioner Rivera entered the United States in 2003 on a P-1 employment visa. App., *infra*, 3a. On December 19, 2003, the Department of Homeland Security (DHS) issued a Notice to Appear in removal proceedings, alleging that Rivera had overstayed her visa. Admin. R. 249. At a hearing before an immigration judge (IJ), she sought asylum, withholding of removal, and protection under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85. App., *infra*, 1a.

Rivera's husband, the other petitioner here, was included in the removal proceeding as a derivative asylum applicant. Pet. App. 2 n.1. The IJ denied petitioners' applications and ordered them removed to Colombia. App., *infra*, 9a.

3. Petitioners' counsel filed a notice of appeal with the BIA (Admin. R. 70, 72-74), but the BIA summarily dismissed their appeal in August 2005 for failure to file a brief or explanatory statement. Pet. App. 14-15. Petitioners, through their counsel, filed a motion to reconsider, asserting that they had in fact timely filed an appeal brief and proffering documents purporting to demonstrate this. *Id.* at 11-12. Noting numerous deficiencies in their evidence, the BIA denied the motion to reconsider on December 6, 2005. *Id.* at 11-13.

4. On May 12, 2006, petitioners, through new counsel, filed a motion to reopen, asserting that their prior counsel was ineffective in failing to file a timely brief with the BIA. Pet. App. 7. Petitioners claimed that, by meeting with new counsel, who "discussed and analyzed" their claim, they learned for the first time on January 1, 2006, that their prior counsel had been ineffective. Pet. 4. The motion to reopen was filed 157 days after the BIA's denial of their motion to reconsider, and 131 days after they had retained new counsel and discussed the case with him.

The BIA denied the motion to reopen. Pet. App. 7-8. In a short per curiam order, it explained that the motion was untimely because it was not filed within 90 days of the BIA's final decision. *Id.* at 7 (citing 8 C.F.R. 1003.2(c)(2)). The BIA noted that, under Eleventh Circuit precedents, the time limits for filing motions to reopen are "mandatory and jurisdictional" and thus "not subject to equitable tolling." *Id.* at 7-8 (citing *Abdi* v.

United States Att'y Gen., 430 F.3d 1148, 1149-1150 (2005), and *Anin* v. *Reno*, 188 F.3d 1273, 1278 (1999)).[1] The BIA further explained that, "[i]n any event," petitioners had not filed their motion until "well more than 90 days" after the date their new counsel had discussed and analyzed their claim. Pet App. 8.

5. Petitioners, through their new counsel, sought review of the BIA's decision in the Eleventh Circuit. Pet. App. 1. A unanimous panel of the court of appeals denied their petition for review in an unreported per curiam opinion. *Id.* at 1-4. Relying on the "controlling precedent in *Abdi*," the court rejected petitioners' argument that "equitable tolling principles should be applied" to their case "because [their initial] counsel was ineffective." *Id.* at 2, 4. The court concluded that the 90-day period for filing a motion to reopen with the BIA was not subject to equitable tolling, "even though" the

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[1] In *Abdi*, the Eleventh Circuit held that the 90-day limit on filing a motion to reopen is "mandatory and jurisdictional, and, therefore, it is not subject to equitable tolling." 430 F.3d at 1150. It quoted this Court's explanation that equitable tolling is available "only sparingly," for example, "in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period," or has "been induced or tricked by his adversary's misconduct." *Id.* at 1149 (quoting *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 96 (1990)). The decision in *Abdi* also relied on the Eleventh Circuit's earlier holding that "the 180-day time limitation for motions to reopen" that applies to "*in absentia* deportation orders could not be equitably tolled on account of ineffective assistance of counsel." *Id.* at 1149-1150 (citing *Anin*, 188 F.3d at 1278). Although petitioners suggest that *Abdi*'s disallowance of equitable tolling "does *not* apply to a case of ineffective assistance of counsel," Pet. 13, that suggestion is belied by *Abdi* itself. See 430 F.3d at 1150 n.2 (declining, in light of its holding that the BIA had no discretion to grant an untimely motion to reopen, to "address [p]etitioner's point that his initial attorney rendered ineffective assistance in failing to file a brief * * * to support [his] appeal").

untimeliness may have been caused by "counsel's deficient performance." *Id.* at 3.

ARGUMENT

Petitioners contend (Pet. 7-13) that the Eleventh Circuit's decision declining to require the BIA to apply equitable tolling in the circumstances of this case was both erroneous and in conflict with the decisions of other courts of appeals. Further review is not warranted, because the Eleventh Circuit's unreported decision correctly rejected equitable tolling and no other court of appeals would hold on these facts that the BIA abused its discretion in refusing to invoke equitable tolling. Petitioners would thus be unable to obtain relief even if equitable tolling were sometimes available.

1. The BIA did not abuse its discretion in denying petitioners' untimely motion to reopen their removal proceeding.

The BIA and the Eleventh Circuit both followed *Abdi*'s holding that the 90-day time limit on filing a motion to reopen is not subject to equitable tolling. Pet. App. 3-4, 7-8. That is a sound interpretation of the applicable statute, 8 U.S.C. 1229a(c)(7)(C)(i) (Supp. V 2005), given the nature of motions to reopen and the fact that Congress has expressly exempted two classes of cases—but not petitioners'—from the 90-day limit, 8 U.S.C. 1229a(c)(7)(C)(ii)-(iii) (Supp. V 2005). Cf. *United States* v. *Brockamp*, 519 U.S. 347, 353 (1997) (concluding from context of tax statute that Congress intended to "decide explicitly whether, or just where and when, to expand the * * * limitations periods"); *United States* v. *Beggerly*, 524 U.S. 38, 48-49 (1998) (disallowing equitable tolling of limitations under the Quiet Title Act in light of other provisions in the statute). As

this Court has observed, "[m]otions for reopening" removal proceedings are "especially" disfavored because "every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." *INS* v. *Doherty*, 502 U.S. 314, 323 (1992); see *INS* v. *Abudu*, 485 U.S. 94, 108 (1988) (noting that automatically allowing aliens to initiate new hearings on the basis of "prima facie allegations" would "waste the time and efforts of immigration judges") (citation omitted). That consideration reinforces the conclusion that the statutory 90-day period for filing a motion to reopen cannot be extended where Congress has not so provided.[2]

2. Petitioners nonetheless assert that this Court should grant review on the basis of an alleged circuit split involving whether equitable tolling is available in situations where an alien claims that her failure to comply with the 90-day time limitation was due to the ineffectiveness or fraud of a privately retained attorney.[3] In fact, it is entirely likely that no court of appeals

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[2] The court of appeals, in holding that equitable tolling was not available, characterized the 90-day period for filing a motion to reopen as "mandatory and jurisdictional." Pet. App. 3 (quoting *Abdi*, 430 F.3d at 1150). It is of no moment in this case whether the filing period is jurisdictional in the sense that it is not subject to forfeiture if an objection is not raised by the government in a timely manner and the BIA refuses to address it. Here, DHS (consistent with its general practice) did not file any response to petitioners' motion to reopen, but the BIA addressed the issue of timeliness. The central point in the text is that the 90-day limit is mandatory and not subject to equitable tolling.

[3] An alien in removal proceedings has a statutory right to be represented by counsel of the alien's choice at no expense to the government, 8 U.S.C. 1229a(b)(4)(A), but this Court has never held that the Constitution requires the government to appoint counsel for aliens in removal proceedings. In *Coleman* v. *Thompson*, 501 U.S. 722 (1991), a habeas corpus case, the Court held that, when the Constitution does not re-

would have held that the BIA abused its discretion in declining to apply equitable tolling on the facts presented here.

a. Three of the decisions that petitioners cite merely assumed without deciding that equitable tolling might be available and held that any equitable relief would be inappropriate in the circumstances presented. In *Chen* v. *Gonzales*, 415 F.3d 151 (2005), the First Circuit addressed the BIA regulation allowing an alien to file only one motion to reopen. It noted that an earlier en banc decision had "explicitly left open" the question "[w]hether equitable tolling is *ever* available to evade a filing limitation in the immigration context." *Id.* at 154 n.3 (citing *Jobe* v. *INS*, 238 F.3d 96, 100 (1st Cir. 2001)). It held that equitable tolling of (*i.e.*, an equitable excep-

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quire the government to provide counsel, the ineffectiveness of privately retained counsel does not violate the Constitution. *Id.* at 754; see *Wainwright* v. *Torna*, 455 U.S. 586 (1982) (per curiam) (no basis for constitutional claim of ineffective assistance of counsel in seeking discretionary state supreme court review of criminal conviction, because there is no constitutional right to counsel in that setting).

There is no obvious reason that the result should be different in the removal context. As Judge Easterbrook has explained:

> The Constitution entitles aliens to due process of law, but this does not imply a right to good lawyering. Every litigant * * * is entitled to due process, but it has long been understood that lawyers' mistakes in civil litigation are imputed to their clients and do not justify upsetting the outcome. The civil remedy is damages for malpractice, not a re-run of the original litigation.

Magala v. *Gonzales*, 434 F.3d 523, 525-526 (7th Cir. 2005) (citations omitted). Indeed, this Court has repeatedly held in other contexts that a party is bound by counsel's errors in civil proceedings. See *Pioneer Inv. Servs. Co.* v. *Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 396-397 (1993); *United States* v. *Boyle*, 469 U.S. 241, 249-250 (1985); *Link* v. *Wabash R.R.*, 370 U.S. 626, 633-634 (1962).

tion to) the one-motion limit is "unavailable where a party fails to exercise due diligence," and that the alien there had failed to do so. *Id.* at 154 (quoting *Jobe*, 238 F.3d at 100).

In *Scorteanu* v. *INS*, 339 F.3d 407 (2003), the Sixth Circuit stated that it "need not decide * * * whether the [180-day deadline applicable to a motion to reopen an *in absentia* proceeding] is subject to equitable tolling," because the alien had exercised "insufficient diligence" to be eligible for it by waiting more than 180 days after retaining different counsel to file his motion. *Id.* at 413-414.

In *Hernandez-Moran* v. *Gonzales*, 408 F.3d 496 (2005), the Eighth Circuit cited the First Circuit's en banc decision in *Jobe* and held that the alien had not shown any "extraordinary circumstances" that could justify tolling the 90-day limitation for nine days. *Id.* at 499-500.

b. The Third Circuit's decision cited by petitioners, *Borges* v. *Gonzales*, 402 F.3d 398 (2005), dealt with a situation in which the alien's failure to file a timely and otherwise proper motion was the result of fraud. The alien alleged that his failure to attend his removal hearing had been due to ineffective assistance of counsel, and that his failure to file a timely motion to reopen his *in absentia* removal proceedings had been due to a paralegal's false statement that such a document had, in fact, been filed. See *id.* at 402. Taking care to note that the alien's argument was *not* "that ineffective assistance of counsel can or should constitute an 'exception' to the 180-day time limit," *id.* at 405, the court held that the period may be equitably tolled where an alien has been the victim of "fraud," which it defined as a situation in which the alien actually and reasonably relied "on false

representations of a material fact made with knowledge of [their] falsity and with intent to deceive the other party." *Id.* at 407 (citation omitted).[4]

Here, petitioners do not speak of "fraud" or allege anything that could fairly be characterized as "fraud" by their initial counsel. They say merely that he caused "prejudice to their interests," Pet. 4, that he failed to submit a filing fee with their motion to reconsider, Pet. 6, and that the BIA's record indicated he had not filed a brief or statement in their appeal, Pet. 3.

c. Petitioners are correct that the Second, Seventh, Ninth, and Tenth Circuits have stated that ineffective assistance of counsel may, at least in certain circumstances, justify equitable tolling of various statutory or regulatory limitations on motions to reopen removal proceedings.[5] But all of those decisions—*Ray* v. *Gonzales*, 439 F.3d 582 (9th Cir. 2006); *Piñeda* v. *Gonzales*, 427 F.3d 833 (10th Cir. 2005); *Pervaiz* v. *Gonzales*, 405 F.3d 488 (7th Cir. 2005); *Riley* v. *INS*, 310 F.3d 1253 (10th Cir. 2002); and *Iavorski* v. *United States INS*, 232 F.3d 124 (2d Cir. 2000)—predate this Court's recent clarification that "[a]ttorney miscalculation is simply not sufficient to warrant equitable tolling, particularly in [a] context where [litigants] have no constitutional right to

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[4] Petitioners also cite (Pet. 11) the Third Circuit's decision in *Mahmood* v. *Gonzales*, 427 F.3d 248 (2005). In *Mahmood*, which involved an untimely attempt to reopen an *in absentia* order, the court recognized its holding in *Borges*, but did not "attempt to define generally what qualifies as ineffectiveness sufficient to justify tolling," because it found that the alien's "lack of diligence" precluded tolling. *Id.* at 252 n.8.

[5] Petitioners cite three cases from the Tenth Circuit. Pet. 11. One of them, *Osei* v. *INS*, 305 F.3d 1205 (2002), never mentions equitable tolling at all.

counsel." *Lawrence* v. *Florida*, 127 S. Ct. 1079, 1085 (2007). As explained above (note 3, *supra*), an alien has no constitutional right to have counsel furnished by the government in removal proceedings, and therefore, under *Coleman*, has no constitutional claim of ineffective assistance of counsel. Accordingly, to the extent the decisions on which petitioners rely suggest that another court of appeals may have granted relief on the facts presented here, such a holding cannot survive *Lawrence*.

d. At any rate, it is highly unlikely that petitioners could have obtained equitable relief in any other circuit, even before *Lawrence*. The circuits that allowed equitable tolling still required the alien to exercise "due diligence." See *Ray*, 439 F.3d at 589 n.5 ("[E]quitable tolling * * * is appropriate * * * as long as the petitioner acts with due diligence.") (quoting *Iturribarria* v. *INS*, 321 F.3d 889, 897 (9th Cir. 2003)); *Piñeda*, 427 F.3d at 838 ("[T]he BIA must review Appellant's due diligence.") (quoting *Riley*, 310 F.3d at 1258); *Chen*, 415 F.3d at 153-154 ("[E]quitable tolling 'is unavailable where a party fails to exercise due diligence.'") (quoting *Jobe*, 238 F.3d at 100); *Pervaiz*, 405 F.3d at 490 ("[T]he test for equitable tolling * * * is whether the claimant could reasonably have been expected to file earlier."); *Iavorski*, 232 F.3d at 134 (holding that alien had "failed as a matter of law to exercise the requisite due diligence" for equitable tolling). That requirement is consistent with this Court's statements about tolling. See *Pace* v. *DiGuglielmo*, 544 U.S. 408, 418 (2005) ("Generally, a litigant seeking equitable tolling bears the burden of establishing * * * that he has been pursuing his rights diligently.").

As the BIA found in this case (Pet. App. 8), petitioners would not be eligible for equitable tolling even if al-

legations of ineffective assistance of counsel were sometimes sufficient to authorize it. Petitioners concede that they retained new counsel, were advised of their "legal remedies," and had "actual notice of their problem" on January 1, 2006. Pet. 4, 6. Even assuming that their deadline could have been tolled until that date, they still did not file their motion to reopen for another 131 days. Cf. *Xhao* v. *INS*, 452 F.3d 154, 156, 160 (2d Cir. 2006) (allowing equitable tolling where motion to reopen was filed 88 days after retention of new counsel); *Ray*, 439 F.3d at 589 n.5 (allowing equitable tolling where motion to reopen was filed 44 days after petitioner had reason to know of prior ineffective assistance of counsel); *Piñeda*, 427 F.3d at 839 (holding equitable tolling unavailable when aliens submitted their motion more than 90 days after the date they belatedly received the administrative record).

Petitioners attribute their extra delay to Hurricane Wilma. Pet. 4-5, 13.[6] But they do not explain how the hurricane affected their ability (or their new attorney's ability) to file a motion to reopen. The 90-day time limit did not even begin to run until several weeks after the hurricane struck, and they first consulted with their new counsel more than two months after the hurricane. The facts petitioners present do not establish that they exercised due diligence.

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[6] Petitioners ask the Court to take judicial notice of Hurricane Wilma. Pet. 5. Reliable government reports indicate that Hurricane Wilma crossed southern Florida on the morning of October 24, 2005. See, *e.g.*, Richard J. Pasch et al., National Hurricane Center, *Tropical Cyclone Report: Hurricane Wilma, 15-25 October 2005*, at 2 (Sept. 28, 2006) <http://www.nhc.noaa.gov/pdf/TCR-AL252005_Wilma.pdf>.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2007

APPENDIX

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
333 South Miami Avenue, Suite 700
Miami, Florida 33130

File Nos.: A 97 199 661
A 97 199 662

IN THE MATTERS OF ADRIANA MERCEDES BENAVIDES-RIVERA AND ANDRES MAURICIO MEJIA-VELA, RESPONDENTS

IN REMOVAL PROCEEDINGS

June 28, 2004

CHARGE: Section 237(a)(1)(B)—overstay.

APPLICATIONS: Section 208(a)—asylum; Section 241(b)(3)—withholding of removal; withholding of removal under Article 3 of the U. N. Convention against Torture.

ON BEHALF OF RESPONDENTS:

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ORAL DECISION OF THE IMMIGRATION JUDGE

The respondents in this case are a married couple, both natives and citizens of Colombia who were issued Notices to Appear (*See* Exhibits 1) by mail, on or about January 9, 2004. The respondents appeared previously before the undersigned on March 5, 2004, and at that time admitted the allegations contained on the Notices to Appear and conceded removability.

The respondents did not immediately designate a country of removal and accordingly, the Court designated Colombia for them.

The Government submitted evidence of country conditions (*See* Exhibit 3). The respondent submitted a Notice of Filing, with information relating to targeted and vulnerable groups in Colombia (*See* Exhibit 4). Additionally, the respondents submitted copies of evidence (*See* Exhibit 5) to the Court. The respondent did not submit authenticated documents in accordance with the regulations. 8 C.F.R. Section 1287.6 (2004).

The sole issue today is whether or not the respondents are eligible, both statutorily and in the exercise of discretion, for the relief that the respondents seek.

TESTIMONY

The lead respondent was the only person to testify today in support of her application. She testified that she was a lawyer in Colombia and that she obtained her credentials in 1997. She testified that she last left her country on March 27, 2003, and came to the United States on a work visa, specifically a P-1 visa. She testified that she is married to the consolidated respondent and they recently had a child, who was born in the United States.

She testified that her father is deceased and that her mother resides in Colombia. She testified that she has two siblings that are also in Colombia at this time, in the town of Pasto.

The respondent testified that she last lived in Bogotá and, as stated, her highest level of education was a law degree. She testified that she studied law at the National University. She testified that she graduated on June 30, 1997, and when asked about her first employment as a lawyer she testified that she was employed at the National Penitentiary Institute of Colombia. She was asked how she obtained that job and she replied that it was through a political contact named Adolfo.

The respondent testified that this group was the government agency that administers the jails. She testified that she was a legal advisor to the general administration. When asked what she did specifically, she testified that she advised the general administration on legal matters and coordinated various committee meetings with the programs for the directors. She was asked who she worked with and she testified, "the general secretaries and chief of the general office."

The respondent also testified that there was a committee by the name of "Working Tables." She testified that she coordinated meetings for this committee, received all of the information and then dealt with health, food and other solutions to problems with the jails, and the process of incarceration. She was asked if she had problems because of her position. She testified affirmatively, stating that she had problems with the paramilitary groups that called themselves the Self Defenses of Colombia. She testified that she was accused of being a guerrilla member.

She testified that she was threatened at a meeting on April 22, 1999, and that she received her first letter threatening her with death. She testified that the directive was from the group and that there were many people that she had become acquainted with, including the chief of police and the chief of the courts, yet none of these people were able to help her. She testified that she was advised to change her residence, change her phone number and identify a different way to get home from work.

The respondent testified that these contacts informed her that she had problems and because of this she got ill. She testified that she received an illness which dealt with the left side of her face and palsy. She testified that she had changed addresses four times, as well as her telephone number. She was then asked what happened with her job and she testified that she resigned.

The respondent testified that she then went to the New Rainbow Corporation. She testified that these individuals that ran it were victims of the guerrillas. She testified that the New Rainbow Corporation had to do with the Social Democratic Party, and that individuals

came back to society. She was asked what she did with the New Rainbow Corporation and she testified she offered legal advice and services to the group due to social conflicts that occurred in Colombia. She was asked if she had problems while working with the New Rainbow coalition, to which she testified affirmatively.

She testified that she received a condolence letter on November 6 of 2001. She was asked if she had problems after this and she testified affirmatively, stating that she had been declared a military objective. She was then asked if she had any other problems and she testified affirmatively, stating that she had left the New Rainbow Corporation with her driver. She testified that two individuals on a motorcycle intercepted them and they made a gesture as if they were reaching for a weapon. She testified instead they had a rock which was thrown through the driver's side with a note that said, "AUC."

The respondent testified that the driver took her to the audiovisual office and told her to take a vacation. The respondent testified that she went to her mother's house in Pasto where they "found me again and threatened me with death." The respondent was asked if she reported this incident to the police and she testified yes, in Pasto. She then testified that she went to Bogotá.

She testified that in Bogotá she was given the option to seek asylum in Canada. She testified that the months went by and nothing happened. She testified that then the best thing she could do was to leave the country.

On cross-examination, the Government asked the respondent if she ever followed up on her claim in Canada. She testified that she talked to the representative, named Jorge Munoz, and he stated that the papers were filed and there was still no answer.

The respondent was asked in redirect examination where she filled out her petition for protection in Canada. She testified that it was through an association that was affiliated with the United Nations.

The respondent made closing argument and the Government waived closing argument.

STATEMENT OF LAW

An applicant for asylum and withholding of removal has the burden of proof to establish that she, he or they, have been subject to past persecution, have a well-founded fear of persecution or have established a clear probability of persecution within the meaning of Section 208(a) and Section 241(b)(3) of the Immigration and Nationality Act. *See Matter of E-P-*, 21 I&N Dec. 860 (BIA 1997). *See also INS v. Elias-Zacarias*, 502 U.S. 478 (1992); *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *Matter of Chen*, 20 I&N Dec. 16 (BIA 1989); *Matter of Moqharrabi*, 19 I&N Dec. 439 (BIA 1987).

The respondent must show that the harm suffered or feared in the future was or would be inflicted on account of her, his or their race, religion, nationality, membership in a particular social group or because of political opinion. *See* Section 101(a)(42)(A) of the Immigration and Nationality Act.

In order to be a "refugee" in one's country, the respondents must show that reasonable internal flight alternatives are not available to them. The burden is on them to show that reasonable flight alternatives are not available as the individuals that they fear are not the official government of the country designated for removal. *See* 8 C.F.R. Section 1208.13 (2004).

Aliens seeking protection under Article 3 of the U. N. Convention against Torture and other cruel, inhumane or degrading treatment or punishment must establish that it is more likely than not that they would be tortured in the country designated for removal by a government official or someone acting under their consent or acquiescence. *See Matter of J-E-*, 23 I&N Dec. 291 (BIA 2002). *See also* 8 C.F.R. Section 1208.18(a) (2004).

FINDINGS OF THE COURT

In this case, the Court finds that the respondents have not suffered persecution in the past and they failed to establish a well-founded fear of persecution in the future based on any protected ground.

In this case, the respondent contends that there are two bases upon which relief can be granted. One, through an imputed political opinion and also through her subsequent employment with the organization that she went to work at after having left the penitentiary job, which was part of the government. In this case, the Court finds that the respondent has failed to establish a well-founded fear of persecution in the future based on any protected ground.

The respondent contends that she has relocated in her country on four occasions after having been advised to do so. She testified that she obtained her first position through a political contact which caused her to have problems, beginning specifically in 1999. She then testified that she received a condolence letter in November of 2001 and that she was declared a military target because of this. She then testified that she was intercepted by a motorcycle, while being driven, and that this

motorcycle threw a rock through the driver's side window with a note attached, AUC.

From the time that the respondent first alleged she had problems in Colombia in April, 1999, the respondent remained in her country for approximately four years. In this case, the respondent testified that other than contracting palsy, which affected her face, nothing happened to her in Colombia. The Court finds that the respondent has failed to establish that anyone in Colombia is interested in her for any of the five statutory grounds for asylum.

It is well established that aliens who flee general conditions of violence and human rights violations in their countries do not qualify for asylum. In enacting Section 208 of the Act, Congress did not intend to confer eligibility for asylum on all persons who suffer harm from civil disturbances, random criminal activity and other conditions that necessarily have political implications. *See Campos-Guardado v. INS*, 809 F.2d 285 (5th Cir.), *cert. denied*, 484 U. S. 826 (1987).

Inasmuch as the respondents have failed to satisfy the lower burden of proof required for asylum, it follows that they have also failed to satisfy the clear probability standard of eligibility required for withholding of removal. *See INS v. Stevic*, 467 U.S. 407 (1984).

The evidence does not establish that if they were now to return to Colombia it is more likely than not that they would be subject to persecution on account of one of the five grounds specified in Section 241(b)(3) of the Immigration and Nationality Act.

The Court finds, further, that there is no credible evidence that a government official or someone acting un-

der their consent and/or acquiescence would torture the respondents if they were to return to Colombia at this time.

In this case, the events that the respondent described do not indicate that the government would acquiescence in or consent to the torture of them if they were to be returned at this time.

Accordingly, the following orders are hereby entered.

ORDERS

IT IS HEREBY ORDERED that the respondents' applications for asylum, withholding of removal under the statute and withholding of removal under the Convention against Torture be, and are, denied.

FURTHER ORDER

IT IS FURTHER ORDERED that the respondents be removed from the United States to Colombia on the charges contained in the Notice to Appear.

/s/ Rex J. Ford
REX J FORD
United States Immigration Judge